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NO. 80-1538

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JAMES PLYLER, Superintendent of Tyler Independent School District and Its Board of Trustees, ET AL.,
And
STATE OF TEXAS,
Appellants,
v.
J. and R. DOE, as Guardian Ad Litem For I. DOE, ET AL.,
Appellees.

Brief of Amici Curiae School Districts of: Harlingen Consolidated Independent School District, Mission Independent School District, Brownsville, Independent School District and McAllen Independent School District, in support of Appellants' Jurisdictional Statement

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QUESTIONS PRESENTED

1. Does a State statute which requires nonresident citizens and nonresident aliens, including illegal aliens, to pay tuition in public schools while exempting all resident citizens and resident aliens from such charges constitute an invalid classification in violation of the Equal Protection Clause of the Fourteenth Amendment?

2. May a State statute providing for free tuition in public schools only for "residents" of the school district define illegal aliens as nonresidents of the school district?

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CONSTITUTION AND STATUTES INVOLVED

THE FOURTEENTH AMENDMENT, UNITED STATES CONSTITUTION, which provides in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TEXAS EDUCATION CODE § 21.031, which provides in pertinent part:

> (a) All children who are citizens of the United States or legally admitted aliens and who are over the age of five years and under the age of 21 years on the first day of September of any scholastic year shall be entitled to the benefits of the Available School Fund for that year.
>
> (b) Every child in this state who is a citizen of the United States or a legally admitted alien and who is over the age of 5 years and not over the age of 21 years on the first day of September of the year in which admission is sought shall be permitted to attend the public free schools of the district in which he resides or in which his parent, guardian, or the person having lawful control of him resides at the time he applies for admission.
>
> (c) The board of trustees of any public free school district of this state shall admit into the public free schools of the district free of tuition all persons who are either citizens of the United States or legally admitted aliens and who are over five and not over 21 years of age at the beginning of the scholastic year if such person or his parent, guardian or person having lawful control resides within the school district.

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INTEREST OF AMICI CURIAE

The amici curiae are school districts of the State of Texas located on or near the Rio Grande River which constitutes the boundary between the United States and Mexico. It is primarily on these school districts that the burden falls of educating illegal aliens from Mexico in the event that the Texas statute in question here were held to be unconstitutional. It is they who will have to bear the financial costs that will result from a ruling of unconstitutionality. It is their educational programs which

must be diluted if they are required to accommodate the large number of illegal aliens with free tuition. Despite the direct impact on them of adjudications of unconstitutionality, these districts, like those of the suburban areas around the City of Detroit in the Detroit school desegregation case, *Milliken v. Bradley*, 418 U.S. 717, 729-30 (1974), are not parties to, and have not participated in, the litigation that will decide their fate. These school districts seek to have the Court understand their position on the validity of the Texas statute in question, a position which, at best, has only been adumbrated and not passed by any parties to the litigation.

I. THE TEXAS STATUTE IN QUESTION HERE DOES NOT CONTAIN ANY CLASSIFICATION IN TERMS OF ALIENAGE OR CITIZENSHIP NOR ANY CLASSIFICATION BETWEEN LEGAL AND ILLEGAL ALIENS. THE STATUTE DISTINGUISHES BETWEEN RESIDENTS — WHETHER CITIZENS OR ALIENS — AND NON-RESIDENTS — WHETHER CITIZENS OR ALIENS.

The Texas statute in issue does not contain a classification on the basis of citizenship or alienage. Resident citizens and resident aliens are both entitled to free tuition. Nonresident citizens and nonresident aliens are both required to pay tuition. The classification was based upon a judgment by the State that the school districts should not provide free education for those who are not legally resident or domiciled within the school district, whether alien or citizen at the cost of those who are residents. Surely it does not test the bounds of constitutional classification for the State to require the local school districts to afford services to those who are fully and properly

ensconced within the districts while denying it to those who are not. This Court has made clear in its rulings that a State may properly treat residents and nonresidents differently in affording free tuition within its schools. Thus, in *Vlandis v. Kline*, 412 U.S. 441, 445, 452-53, 453-54 (1973), the Court said:

> The appellees do not challenge, nor did the District Court invalidate, the option of the State to classify students as resident and nonresident students, thereby obligating nonresident students to pay higher tuition fees than do bona fide residents. The State's right to make such a classification is unquestioned here.
>
> * * *
>
> We fully recognize that a State has a legitimate interest in protecting and preserving the quality of its colleges and universities and the right of its own bona fide residents to attend such institutions on a preferential tuition basis.
>
> * * *
>
> The State can establish such reasonable criteria for in-state status as to make virtually certain that students who are not, in fact, bona fide residents of the State, but who have come there solely for educational purposes, cannot take advantage of the in-state rates.

And see Michelson v. Cox, 476 F.Supp. 1315, 1319 (S.D. Iowa 1979); *Hooban v. Boling*, 503 F.2d 648, 650 (6th Cir. 1974); *Montgomery v. Douglas*, 388 F.Supp. 1139, 1142 (D. Col. 1974); *Pelletreau v. Savage*, 381 F.Supp. 582, 585 (D. N.H. 1974); *Kelm v. Carlson*, 473 F.2d 1267, 1268 (6th Cir. 1973); *Sturgis v. State of Washington*, 368 F.Supp. 38 (W.D. Wash. 1973), *aff'd mem.*, 414 U.S. 1057 (1973); *Weaver v. Kelton*, 357 F.Supp. 1106, 1110 (E.D. Tex. 1973); *Johns v. Redeker*, 406

F.2d 878, 883 (8th Cir. 1969); *Clarke v. Redeker*, 259 F.Supp. 117, 123-24 n. 7 (S.D. Iowa 1966).

The question here is, rather, whether a State is required by the Equal Protection Clause to treat illegal aliens as residents within the meaning of the statute. As we shall show in the next section of this brief, there can be no such requirement for treating illegal aliens as residents. To say, however, that the issue is not one of classification between citizens and noncitizens or between legally admitted aliens and illegal aliens is not to say that such a classification is not valid. It is, indeed, not a classification made by the State of Texas, but a classification made by Congress, which has plenary authority over immigration and naturalization. Legal aliens are in this country at the invitation and tolerance of the United States. As such, they are not subject to discriminatory classification by the States, except for overriding policy reasons. *E.g., Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974); *Ambach v. Norwick*, 441 U.S. 68 (1979). As this Court noted in *Mathews v. Diaz*, 426 U.S. 67, 80 (1976):

> [The] fact that Congress has provided some welfare benefits for citizens does not require it to provide like benefits for *all aliens*. Neither the overnight visitor, the unfriendly agent of a hostile foreign power, the resident diplomat, nor the illegal entrant can advance even a colorable constitutional claim to a share in the bounty that a conscientious sovereign makes available to its own citizens and *some* of its guests. [Emphasis in original.]

The proposition becomes more cogent in light of the fact that an obligation on the part of the school district to provide educational facilities to illegal aliens results in a proportionate diminution in the educational facilities

that it can make available to its resident citizens and resident legal aliens.

II. THE TEXAS STATUTE PROVIDES ONLY THAT ILLEGAL ALIENS SHALL NOT BE TREATED AS RESIDENTS FOR PURPOSES OF FREE TUITION IN ITS PUBLIC SCHOOLS.

As heretofore suggested, the real question in this case is whether Texas is forbidden to treat illegal aliens as nonresidents of a school district and, therefore, not qualified to receive free tuition. A cognate question was reviewed by this Court in *Elkins v. Moreno*, 435 U.S. 647 (1978). There, the question was whether Maryland had to treat "G-4 aliens," aliens with a nonimmigrant and temporary status in the United States, as domiciled within the State for purposes of receiving reduced tuition at the University of Maryland. "Accordingly, the question whether G-4 aliens have the capacity to acquire Maryland domicile is potentially dispositive of this case." 435 U.S. at 662. The Court held that the answer to this question was dependent on federal statutory law and Maryland common law.

In that case, however, this Court ruled that the federal statutory law did not require that G-4 aliens maintain a permanent residence abroad. Here, it is clear that the immigration laws do so require as to illegal aliens. It cannot be said of illegal aliens what the Court said of nonimmigrant aliens in *Elkins*, 435 U.S. at 666-67:

> Under present law, therefore, were a G-4 alien to develop a subjective intent to stay indefinitely in the United States, he would be able to do so without violating either the 1952 Act, the Service's regulations, or the terms of his visa. Of course, should a G-4 alien terminate his employment with an inter-

> national treaty organization, both he and his family would lose their G-4 status. . . . Nonetheless, such an alien would not necessarily be subject to deportation or would he have to leave and re-enter the country in order to become an immigrant.

Under the federal immigration laws, illegal aliens may not remain within this country and are subject to immediate deportation. 8 U.S.C. § 1227. While legal aliens may change their status from nonimmigrant to immigrant, 435 U.S. at 667-68, illegal aliens are not equally able to change their status from illegal to legal.

The fact that the laws of the United States did not preclude a G-4 alien from establishing domicile did not resolve the issues in *Elkins*, for the Court made it clear that whether such an alien could establish domicile in Maryland was a matter of Maryland law: "[T]he question whether G-4 aliens can become domiciliaries of Maryland is potentially dispositive of this case and is purely a matter of state law." 435 U.S. at 698. The case was accordingly remanded to the Maryland Court of Appeals to resolve the question.

The Maryland Court of Appeals held that a G-4 alien could establish domicile in Maryland. *Toll v. Moreno*, 284 Md. 425, 444 (1979). In doing so, however, it carefully delineated the distinction between aliens entitled to remain in this country under the immigration laws and those who are illegally here. It quoted from an earlier Maryland Court of Appeals decision, *Dorf v. Skolnik*, 280 Md. 101, 116-17 (1977):

> If under federal law a particular individual must leave this country at a certain date, or cannot remain here indefinitely, then he could not become domiciled in Maryland. Any purported intent to live here indefinitely would be inconsistent with law.

> It would at most be an unrealistic subjective intent, which is insufficient under Maryland law to establish domicile. [Quoted, 284 Md. at 442-43.]

The Texas law on the question of the meaning of residence for purposes of its educational code is equally clear. The courts have defined "resident," both for citizens and aliens. Residence means the permanent abode of the school child or its parents. It is, as the United States District Court said in *Arredondo v. Brockette*, 482 F.Supp. 212, 221 (S.D. Tex. 1979), in reliance on *DeLeon v. Harlingen Consolidated Independent School Dist.*, 552 S.W.2d 922 (Tex. Civ. App. 1977), "more closely related to the concept of domicile." 482 F.Supp. at 221. Federal decisions underline the validity of the Texas proposition in the statute that illegal aliens cannot be residents for purposes of the school code. See *Castillo-Felix v. I.N.S.*, 601 F.2d 459, 464 (9th Cir. 1979); *Anwo v. I.N.S.*, 607 F.2d 435 (D.C. Cir. 1979); see also, *e.g.*, *United States v. Corsi*, 287 U.S. 129, 133 (1932); *United States v. Riela*, 337 F.2d 986 (3d Cir. 1964); *Werblow v. United States*, 134 F.2d 791, 792 (2d Cir. 1943); *United States v. Day*, 43 F.2d 917 (2d Cir. 1930); *United States v. Chandler*, 152 F. Supp. 169, 177 (D. Md. 1957); *United States v. Anastasio*, 120 F. Supp. 435 (D. N.J. 1954); *United States v. Parisi*, 24 F. Supp. 414, 419 (D. Md. 1938); *In re Scriver*, 9 F. Supp. 478, 479-80 (W.D. N.Y. 1935). Illegal entry by aliens cannot ground legal residence.

Thus, whether under the law of the State, which this Court held to be controlling in *Elkins*, or even under the federal decisions construing the immigration laws, as in *Castillo-Felix* and *Anwo*, illegal aliens cannot establish the residence or domicile requisite to qualify for free tuition within a Texas school district.

III. CONCLUSION.

This Court should accept jurisdiction of this appeal and reverse the judgment below which improperly held the Texas statute in question to be violative of the Constitution of the United States.

Respectfully submitted,

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